

May 30, 2003

FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION NO. 25-
PRACTICES OF TRANSPACIFIC STABILIZATION AGREEMENT MEMBERS
COVERING THE 2002-2003 SERVICE CONTRACT SEASON

AMENDED ORDER OF INVESTIGATION

The Federal Maritime Commission ("Comimission") instituted this nonadjudicatory fact finding proceeding on August 23, 2002. to investigate allegations that the ocean common carrier members of the Transpacific Stabilization Agreement ("TSA") had engaged in practices in the inbound Far East - United States trade during the 2002 - 2003 service contract season that were potentially in violation of various provisions of the Shipping Act of 1984, 46 U.S.C. app. § 1701 *et seq* ("1984 Act"). Commissioner Joseph E. Brennan was appointed as Investigative Officer and was authorized to conduct public and non-public hearings, administer oaths and utilize compulsory process, including orders pursuant to section 15 of the 1984 Act in order to obtain relevant information. Hearings were held in Long Beach and San Francisco, CA, Seattle, WA, and Washington, D.C., where testimony and documents were received under oath. Commissioner Brennan conducted the investigation and submitted a confidential Report and Recommendations to the Commission on April 10, 2003.

Allegations that the members of TSA were engaged, individually and jointly, in conduct prohibited by the 1984 Act were raised in a joint petition filed by the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") and the International Association of NVOCCS ("IANVOCC") on May 10, 2002. Specifically, the petitioners alleged that TSA members had entered into an agreement to complete service contract negotiations with proprietary shippers before beginning negotiations with non-vessel-operating common carriers ("NVOCCs"). Petitioners further alleged that TSA members discriminated against NVOCCs by subjecting NVOCC contracts to general rate increases ("GRIs") and a peak season surcharge ("PSS"), but not including similar provisions in contracts with proprietary shippers.

Following receipt of the joint petition, the Commission directed the staff to obtain and assess additional information regarding TSA member practices during the 2002 - 2003 contracting season. Due to the seriousness of the allegations, comments received thereon, and the decision of TSA members to institute a second GRI with the knowledge that certain shippers would be exempt from the increase due to the terms of their contracts with TSA, the Commission ordered this fact finding investigation to gather additional facts and data on the following issues, among others:

1. Refusals to deal with NVOCCs until the substantial completion of negotiations with proprietary shippers;
2. The discriminatory application in NVOCC service contracts of GRIs and/or a PSS, while waiving or otherwise not requiring similar application in proprietary shipper service contracts;
3. The extent and degree to which the rate increases and service contract policies, practices, and guidelines of TSA have been, and

remain, voluntary and non-binding upon its respective members;

4. The extent and degree to which TSA and its members have maintained and transmitted to the Commission full, complete, and accurate minutes of all meetings required to be filed with the Commission; and

5. The development and utilization of open-ended provisions that permit the unilateral implementation of GRIs and/or a PSS by TSA members in their service contracts with NVOCCs, without genuine further negotiation, while waiving or not requiring similar provisions in their service contracts with proprietary shippers.

The Commission has now determined to continue to pursue certain of these issues, together with related issues developed during this fact finding investigation, through further investigation and possible actions under sections 5, 6, 8, 10, 11, 12 and 15 of the 1984 Act, as appropriate. The Commission has further determined to extend the period under review to include the 2003 - 2004 service contract season and, in particular, the impact of any 2003 general rate increase and peak season surcharge on proprietary shippers and NVOCCs. To facilitate such investigation, the Commission is continuing this fact finding proceeding to assist in developing the most current evidence of the activities of TSA and its members in the eastbound transpacific trades, as related to the following issues, among others:

1. The extent and degree to which TSA members may have violated section 10(b)(13) of the 1984 Act by disclosing confidential shipper information related to individual service contracts, including the identity of the shipper signatories.

2. Whether and to what extent TSA members may have violated sections 10(a)(2) and/or 10(a)(3) of the 1984 Act by systematically removing tonnage from the transpacific trades, individually, or through carrier alliances, following detailed discussions and exchanges of information on capacity reduction within TSA.

3. Whether and to what extent TSA's failure to file minutes of meetings of senior executives held in conjunction with Presidents, Owners, and Revenue Policy Committee meetings, as well as its failure to file full and complete minutes of other meetings, may have resulted in violations of the Commission's minute filing regulations at 46 C.F.R. §§ 535.706(a) and (b).

4. Whether and to what extent TSA and/or its members have engaged in unjustly discriminatory practices in the matter of rates and charges with respect to NVOCCs as a class in violation of section 10(c)(7) of the 1984 Act.

5. Whether and to what extent TSA and/or its members have unduly or unreasonably prejudiced or disadvantaged NVOCCs as a class in violation of section 10(c)(8) of the 1984 Act.

6. Whether TSA and/or its members have engaged in practices which actively discourage members from taking independent rate actions, contrary to the Congressional policy, embodied in sections 5(c)(1) and (3) of the 1984 Act and its legislative history, to foster individual, confidential service contracts to offset the anticompetitive impact of rate fixing agreements.

7. Whether and to what extent, the TSA agreement and/or other related agreements to which TSA or its members are parties, have produced, or are likely to produce, by a reduction in competition, an unreasonable decrease in transportation service or an unreasonable increase in transportation cost, as described in section 6(g) of the 1984 Act.

In addition, the Commission is designating Vern W. Hill, Director, and George A. Quadrino, Attorney, Bureau of Enforcement, as the Investigative Officers for the continued phase of this proceeding. Messrs. Hill and Quadrino will have all of the powers formerly delegated to Commissioner Brennan to pursue the issues set forth above.

Interested persons are invited and encouraged to contact the Investigative Officers named herein, at (202) 523-5783 (Phone) or (202) 523-5785 (Fax), should they wish to provide

testimony or evidence, or to contribute in any other manner to the development of a complete factual record in this proceeding.

THEREFORE, IT IS ORDERED, That pursuant to sections 5, 6, 8, 10, 11, 12 and 15 of the Shipping Act of 1984, 46 U.S.C. app. §§ 1704, 1705, 1707, 1709, 1710, 1711 and 1714, and Part 502, Subpart R of Title 46 of the Code of Federal Regulations, 46 C.F.R. § 502.281, *et seq.*, this nonadjudicatory investigation into practices of the ocean common carriers listed in Appendix A in the eastbound Transpacific trades is continued in order to develop the issues set forth above and to provide a basis for any subsequent regulatory, adjudicatory or injunctive action by the Commission;


IT IS FURTHER ORDERED, That the Investigative Officers shall be Vern W. Hill, Esq., Director, and George A. Quadrino, Attorney, Bureau of Enforcement, of the Commission. The Investigative Officers shall be assisted by staff members as may be assigned by the Commission's Executive Director and shall have full authority to hold public or non-public sessions, to resort to all compulsory process authorized by law (including the issuance of subpoenas *ad testificandum* and *duces tecum*), to administer oaths, to require reports, and to perform such other duties as may be necessary in accordance with the laws of the United States and the regulations of the Commission;

IT IS FURTHER ORDERED, That the Investigative Officers shall issue a report of findings and recommendations no later than December 2, 2003, and interim reports if it appears that more immediate Commission action is necessary, such reports to remain confidential unless and until the Commission provides otherwise;

IT IS FURTHER ORDERED, That this proceeding shall be discontinued upon acceptance of the final report of findings and recommendations by the Commission, unless otherwise ordered by the Commission; and

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register.

By the Commission.



Bryant L. VanBrakle
Secretary

Appendix A

1. American President Lines ("APL")
2. A.P. Moller Maersk-Sealand
3. CMA CGM, S.A.
4. Cosco Container Lines Ltd.
5. Evergreen Marine Corp.
6. Hanjin Shipping Company, Ltd.
7. Hapag-Lloyd Container Linie, GmbH
8. Hyundai Merchant Marine Co., Ltd.
9. Kawasaki Kisen Kaisha, LTD.
10. Mitsui O.S.K. Lines, Ltd.
11. Nippon Yusen Kaisha ("NYK")
12. Orient Overseas Container Line, Ltd.
13. P&O Nedlloyd, B.V.
14. P&O Nedlloyd, LTD.
15. Yang Ming Marine Transport Corp.